

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

UNPUBLISHED
July 21, 2005

Plaintiff/Counter-Defendant-
Appellant,

v

WILLIAM KOCH and TERRI KOCH,

No. 252659
Calhoun Circuit Court
LC No. 02-002374-CK

Defendants/Counter-Plaintiffs-
Appellees.

and

WILLIAM KOCH and TERRI KOCH,

Third Party-Plaintiffs-Appellees,

v

JAMES MARSH and MICHAEL A. CAPUTO,

Third Party-Defendants-Appellants.

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

This case began as a declaratory action filed by plaintiff insurance company, Farm Bureau, against its insured, the Kochs. The Kochs filed a counter- and cross-complaint alleging breach of contract, negligence, unfair trade practice, assault, battery, and trespass arising out of the adjustment of an insurance claim for damage to the Kochs' home cause by ice-damming. Farm Bureau, and its adjusters Marsh and Caputo, sought summary disposition of the Kochs' claims for negligence, which was denied by the trial court. After a further denial of a motion for reconsideration, the parties proceeded with a summary jury trial. Although awarding the Kochs \$181,200 on their claim for negligence and trespass, the jury found no cause of action as to the remainder of the Kochs' claims. Farm Bureau, Marsh, and Caputo (hereinafter collectively referred to as Farm Bureau) appeal as of right. We reverse and remand.

Farm Bureau argues that because it owed the Kochs no duty outside the terms of the parties' contract, the trial court erred in denying its motion for summary disposition of the Kochs claim for negligence.¹ This Court reviews de novo the trial court's decision concerning a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) considers the legal sufficiency of the complaint and may be granted when claims are so clearly unenforceable that no factual development could possibly justify recovery. *Golec v Metal Exch Corp*, 208 Mich App 380, 382; 528 NW2d 756 (1995). The pleadings alone are considered and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-moving party. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003).

In determining whether a negligence action based on a contract may lie, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. See *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004); see also *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956). If no independent duty exists, there can be no tort action based on contract. *Fultz, supra*.

With respect to the often hazy distinction between duties and obligations arising from the contract, and those distinct from such agreements and upon the breach of which an action in tort may be maintained, it has been explained that:

[t]ort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction. Therefore, if the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent [to contract], then contract law should be the *only* theory upon which liability would be imposed. [Prosser & Keeton, Torts, § 92 at 656 (5 ed, 1984).]

¹ We reject the Kochs' assertion that because the counter- and cross-complaint was subsequently amended, the issue whether the trial court's denial of Farm Bureau's motion for summary disposition of the Kochs' claim for negligence was proper is not preserved for our review. The amended complaint did not alter the factual or legal premise for the Kochs' claim of negligence. Rather, regarding negligence the amended complaint appears to be intended only to conform the allegations in this case to the ruling of the trial court that granted partial summary disposition in favor of Farm Bureau with respect to the Kochs' claims arising from the uniform trade practices act, MCL 500.2001 *et seq*. Under these circumstances, a second motion was not required and would only promote needless litigation and the waste of judicial resources.

We agree, however, that because Farm Bureau failed to expressly challenge the legal sufficiency of the Kochs' claim for intentional infliction of emotional distress, which was added by the amended complaint, that issue is not preserved for our review. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Regardless, we note that the jury's finding of no cause of action on that claim and our decision to reverse the judgment in this matter on other grounds renders any challenge in that regard moot.

Consistent with the policy considerations discussed above, Michigan law imposes a duty to perform any undertaking with reasonable care, whether a contract governs that performance or not. See *Hart, supra* at 565. Thus, negligent performance, i.e., misfeasance, of a contract is not only a breach of the duty created by the contract, but also a breach of the separate and legally distinct duty to perform any “promise in a careful and skillful manner without risk of harm to others.” *Id.* However, this duty to act with due care encompasses only the obligation to prevent injury from a “peril” created during the performance. *Id.* Thus, the mere failure to act, i.e., nonfeasance, is insufficient to support an action in tort. *Id.*

Here, the Kochs alleged a breach of Farm Bureau’s duty to train and supervise its employees and to resolve their claim in good faith. The Kochs further alleged that Farm Bureau was “negligent” in failing to warn them of mold damage discovered by its adjusters and to ensure that their claim was promptly and reasonably investigated. It is well settled, however, that Michigan does not recognize a separate tort cause of action for bad faith breach of an insurance contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401; 419-421; 295 NW2d 50 (1980). Moreover, to the extent that the remainder of the allegations within the Kochs’ complaint may be read to allege that Farm Bureau negligently performed the contract by failing to act reasonably or otherwise ensure that the Kochs’ claim for loss was promptly processed, we note that such failure did not itself create the “peril” alleged by plaintiffs to have caused them harm, i.e., a leaky roof. *Hart, supra*. Indeed, that peril existed at the time plaintiffs first contacted Farm Bureau in order to assert a claim of loss under the insurance contract and is thus in no way attributable to any misfeasance in the performance of the contract by Farm Bureau or its employees. Accordingly, the Kochs’ claim for negligence based on the failure to warn, instruct, supervise, or otherwise reasonably process their claim does not arise from any duty separate and distinct from the contract. Summary disposition of that claim was, therefore, appropriate, and the trial court erred in concluding otherwise. Further, to the extent the Kochs alleged that the damages suffered by them were exacerbated by Farm Bureau’s failure to act promptly and reasonably, the obligation to mitigate or otherwise prevent any further damage resulting from any covered loss was contractually borne by the Kochs. Farm Bureau’s obligation with respect to such damages was merely to reimburse the Kochs for any reasonable costs associated with such mitigation. Under such circumstances, the policy considerations underlying the imposition of tort obligations apart from any manifested intention of parties to a contract, i.e., “to avoid some kind of loss to others,” do not apply. *Prosser, supra*.

We therefore reverse the judgment insofar as it reflects a finding in favor of the Kochs on their claim of negligence, and remand this matter for a determination of nominal damages stemming from the Kochs’ claim for trespass. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra